

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD FLEMING, )  
                        )  
                        )  
Plaintiff,            )  
                        )  
                        )  
v.                     ) Civil Action No. 02-164 Erie  
                        )  
                        )  
SUPERINTENDENT, WOLFE, et al., )  
                        )  
                        )  
Defendants.           )

**BRIEF IN SUPPORT OF MOTION FOR BENCH TRIAL**

It is unclear whether or not it is too late for Fleming to ask for a jury trial now under the circumstances, since defendants are only now filing an answer and they are not required to do so in this kind of action under the provisions of the PLRA since this Court has not entered a qualified order under its provisions. 42 U.S.C. § 1997e(g)(1) and (2). However, it would seem that a sufficient time has elapsed since this Court first indicated that this case was to go to trial at the telephone status conference of August 31, 2005 at which it denied defendants' motion for summary judgment without prejudice and the current date has been set by written order since September 26. Under the circumstances, Fleming simply has not made a timely jury trial demand.

The standard for granting an untimely demand is abuse of discretion under F.R.C.P. 39(b). This Honorable Court would not abuse its discretion here by overlooking Fleming's failure to demand a jury trial. Meeco Manufacturing Co., Inc. v. Imperial

Manufacturing Group, 2005 WL 149685 at 3 (D.Wash.) (collecting cases showing that the Ninth Circuit “severely constrained” a court’s discretion under the rule to excuse plaintiff’s failure to make a demand due to oversight or inadvertence, granting relief only in exceptional circumstances such as where a plaintiff made a demand in an obscure manner or failed to properly serve it or he did not have a full opportunity to make a timely demand because his lawyer at the time was not representing his interests and stating the law would not permit a jury trial even where a pro se plaintiff was unaware of the need to ask for one); Merritt v. Faulkner, 697 F.2d 761 (7<sup>th</sup> Cir. 1983) (denying an untimely demand by a blind pro se plaintiff). In Millimaci v. Horn, C.A. No. 950280 Erie, Senior District Judge Cohill strictly enforced the failure to make a timely jury trial demand on defendants’ motion against a paraplegic Albion inmate (also representing himself) who had it seems previously relied as sufficient on the jury trial demand of a medical defendant in that case who had settled by time of trial.

WHEREFORE, it is respectfully submitted that this case should be a bench trial.

Respectfully submitted,

**THOMAS W. CORBETT, JR.**  
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 Date: October 6, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the within Brief In Support of Motion for Bench Trial was served upon the following via first-class mail on October 6, 2005.

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